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No. ____

In the Supreme Court of the United States

ROY S. MOORE,
Petitioner,

v.

JUDICIAL INQUIRY COMMISSION OF THE STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari To The Supreme Court Of The State Of Alabama

PETITION FOR WRIT OF CERTIORARI

BENJAMIN D. DUPRÉ
GREGORY M. JONES
FOUNDATION FOR MORAL LAW, INC.
P.O. Box 231264
Montgomery, AL 36123
(334) 262-1245

HERBERT W. TITUS*
TROY A. TITUS, P.C.
477 Viking Drive, Suite 150
Virginia Beach, VA 23452
(757) 486-8700

PHILLIP L. JAUREGUI
PHILLIP L. JAUREGUI, LLC
P.O. Box 43934
Birmingham, AL 35243
(205) 970-6050

**Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether, under the Free Exercise Clause of the First Amendment as applied to the States, the Alabama Court of the Judiciary required an unconstitutional religious test as a qualification to public office when it removed Alabama Chief Justice Roy S. Moore from office because he refused to obey a federal court order—and unrepentantly would continue to refuse any similar court order—prohibiting him from freely acknowledging God as the moral foundation of law.

2. Whether the Alabama Court of the Judiciary, in a proceeding charging Chief Justice Roy S. Moore with breaching the Canons of Judicial Ethics, denied the Chief Justice his property without due process of law under the Fourteenth Amendment, by refusing to hear his defense that the underlying court order, which prohibited him from acknowledging God as the moral foundation of law, was unlawful and unethical.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED 1

STATEMENT OF THE CASE 2

A. The Underlying Federal Litigation 2

B. The State Judicial Ethics Proceedings 4

C. The Court Of The Judiciary Opinion 7

D. The Appeal To The Alabama Supreme Court 8

REASONS FOR GRANTING THE WRIT 9

I. THE DECISION TO REMOVE CHIEF JUSTICE MOORE FROM PUBLIC OFFICE CONFLICTS WITH *TORCASO V. WATKINS* AND *MCDANIEL V. PATY* 10

A. The Courts Below Removed Chief Justice Moore From Office Because He Refused To Forsake His Acknowledgment Of God In The Performance Of His Official Duties 11

Page

B. The Decision To Remove Chief Justice Moore For Refusing To Forsake His Acknowledgment Of God Answered An Important Federal Question In Conflict With *Torcaso v. Watkins* And *McDaniel v. Paty.* 14

II. THE DECISIONS BELOW DENYING CHIEF JUSTICE MOORE ANY OPPORTUNITY TO MAKE AN ETHICAL DEFENSE OF HIS ACTION ANSWERED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH THIS COURT'S DUE PROCESS PRINCIPLES 20

A. Chief Justice Moore Was Denied A Property Interest Protected By The Due Process Principles Of This Court. 21

B. Chief Justice Moore's Property Interest Was Denied Without Any Meaningful Opportunity To Be Heard On The Essential Element Of The Offense Of Which He Was Charged. 22

1. The Different Nature of the State Ethics Proceedings 23

2. The Significance of the Denial of Due Process 28

CONCLUSION 30

APPENDIX

TABLE OF CITED AUTHORITIES

Page

CASES

Bell v. Burson, 402 U.S. 535 (1971) 23

Butler v. Alabama Judicial Inquiry Comm'n, 802 So. 2d 207 (Ala. 2001) 9

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 22

Davis v. Beason, 133 U.S. 333 (1890) 17, 28

Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala. 2002) ..... *passim*

Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003) 3, 11, 13, 17

Glassroth v. Moore, 275 F. Supp. 2d 1347 (M.D. Ala. 2003) 4

Goss v. Lopez, 419 U.S. 565 (1975) 21

Gregory v. Ashcroft, 501 U.S. 452 (1991) 27

Everson v. Bd. of Educ., 330 U.S. 1 (1947) 17

Ex parte Hann, 592 So. 2d 577 (Ala. 1992) 21

Faretta v. California, 422 U.S. 806 (1975) 30

In re Samford, 352 So. 2d 1126 (Ala. 1977) 4

In re Summers, 325 U.S. 561 (1945) 15, 18

Int'l Union, United Mine Workers of America v. Bagwell, 512 U.S. 821 (1994) 25

Lindsey v. Normet, 405 U.S. 56 (1972) 22

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 28

McDaniel v. Paty, 435 U.S. 618 (1978) 19, 20

Page

McGowan v. Maryland, 366 U.S. 420 (1961).....2

Parke v. Raley, 506 U.S. 20 (1992).....24

Reynolds v. United States, 98 U.S. 145 (1878).....17, 28

Tafflin v. Levitt, 493 U.S. 455 (1990).....27

Torcaso v. Watkins, 367 U.S 488 (1961)....10, 14, 15, 16, 18

United States v. Lopez, 514 U.S. 549 (1995).....27

United States v. Morrison,
529 U.S. 598 (2000).....27

CONSTITUTIONAL PROVISIONS

Ala. Const. of 1901, preamble 19, 29

Ala. Const. of 1901, art. I, § 3 19

Ala. Const. of 1901, art. XVI, § 279.....2, 29

Ala. Const. of 1901, amend. 328, § 6.10 2

Ala. Const. of 1901, amend. 328, § 6.19 5

Ala. Const. of 1901, amend. 581, § 6.17 4

Ala. Const. of 1901, amend. 581,
§ 6.18(a) and (b).....5, 8, 21, 22

U.S. Const. art. VI.....2, 15, 29

U.S. Const. amend. I.....3

Va. Const. art. I, § 16.....28

STATUTES AND RULES

Ala. Code of 1975, § 12-2-30(a) and (b)(7).....29

Alabama Canons of Judicial Ethics, Canon 1 .....5, 28

Page

Alabama Canons of Judicial Ethics, Canon 2.....2, 28, 29

28 U.S.C. § 453.....10

OTHER AUTHORITIES

American State Papers and Related Documents on Freedom in Religion (The Religious Liberty Assoc., 4th rev. ed. 1949).....14

Black's Law Dictionary (6th ed. 1990).....25

Black's Law Dictionary (7th ed. 1999).....25, 29

I W. Blackstone, *Commentaries on the Laws of England* (Univ. of Chi. Facs. ed. 1765).....27

Oliver Ellsworth, *Landholder*, No. 7, Essays 168-71 (Dec. 17, 1787), in 4 *The Founders' Constitution* (P. Kurland & R. Lerner eds. 1987).....15

Thomas Jefferson, "A Bill for Establishing Religious Freedom" (June 12, 1779), in 5 *The Founders' Constitution* 77 (P. Kurland & R. Lerner eds. 1987).....15

J. Madison, Memorial and Remonstrance (1785).....17, 28

I *Samuel* 16:7b.....18

PETITION FOR WRIT OF CERTIORARI

Petitioner, former Alabama Supreme Court Chief Justice Roy S. Moore, respectfully petitions for a writ of certiorari to review the judgment of the Alabama Supreme Court affirming the decision of the Alabama Court of the Judiciary: (1) finding Chief Justice Moore in violation of the Alabama Canons of Judicial Ethics, and (2) removing him from his elected office of Chief Justice of the Alabama Supreme Court.

OPINIONS BELOW

The Alabama Court of the Judiciary's final judgment (No. 33), finding Chief Justice Moore in violation of the Canons of Judicial Ethics and ordering him removed from his elected office, was entered on November 13, 2003, and is unreported. (App. 26a-33a). The Alabama Supreme Court opinion affirming the Court of the Judiciary's judgment was entered on April 30, 2004, and is reported at ___ So. 2d ___, No. 1030398 (Ala. 2004) (App. 1a-25a).

JURISDICTION

The Alabama Supreme Court entered its decision on April 30, 2004. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This case involves the Supremacy and Oath provisions of Article VI of the United States Constitution, the Free Exercise Clause of the First Amendment, the Tenth Amendment, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This case also concerns: (a) the Preamble to the Alabama Constitution of 1901, the Oath provision of Article XVI, § 279 thereof, and § 6.10 of Amendment 328 thereto; (b) Alabama Code § 12-3-30(a) and (b)(7); and (c) Canons 1 and 2 of the Alabama Canons of Judicial Ethics. (App. 144a-150a.)

STATEMENT OF THE CASE

In November 2000, a strong majority of Alabama voters elected Roy S. Moore to serve as Chief Justice of the Supreme Court of Alabama. On January 15, 2001, Chief Justice Moore—as required by Article VI of the United States Constitution and by Article XVI, § 279 of the Alabama Constitution of 1901—swore a solemn oath to "support the Constitution of the United States, and the Constitution of the State of Alabama . . . So help me God." (App. 144a, 145a).

A. The Underlying Federal Litigation

On August 1, 2001, Chief Justice Moore, in accordance with his oath—and pursuant to his constitutional and statutory responsibility and authority as administrative head of the Alabama judicial department, *see* Ala. Const. of 1901, amend. 328, § 6.10 (App. 146a), and as lessee of the Alabama State Judicial Building—received and placed a granite monument[1] in the rotunda of the Alabama State Judicial Building. *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1320-21 (M.D. Ala. 2002) (App 146a, 136a-138a). At the dedicatory ceremony, Chief Justice Moore stated that the monument "depict[s] the moral foundation of our law," and "remind[s] the . . . judges . . . of this state, the members of the bar . . . , as well as the people of Alabama . . . of the truth stated in the preamble of the Alabama Constitution, that in order to establish justice, we must invoke 'the favor and guidance of Almighty God.'" *Id.* at 1322 (App. 138a). Quoting from Justice William O. Douglas's dissenting opinion in *McGowan v. Maryland*, 366 U.S. 420 (1961), the Chief Justice explained that the monument would serve as a reminder that "'there is an authority higher than the authority

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[1] The monument contained excerpts from: (a) the Ten Commandments; (b) official American government documents; and (c) English and early American lawyers and statesmen (including Justice James Wilson and Chief Justice John Jay). *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1320-21 (M.D. Ala. 2002) (App 135a, 136a-138a).

of the State, that there is a moral law which the State is powerless to alter, and that the individual possesses rights conferred by the Creator which government must respect.'" 229 F. Supp. 2d at 1322 (App. 139a).

Following this dedication, three Alabama attorneys filed suit in the United States District Court for the Middle District of Alabama, seeking an injunction to remove the monument because, they claimed, it violated the Establishment Clause of the First Amendment[2] as applied to the States. *Id.* at 1293 (App. 87a). On November 18, 2002, District Court Judge Myron Thompson held that "the Chief Justice violated the Establishment Clause" because he placed the Ten Commandments monument "in the Alabama State Judicial Building **with the specific purpose and effect . . . of acknowledging the Judeo-Christian God as the moral foundation of our laws**" and "**of establishing a permanent recognition of the 'sovereignty of God,' the Judeo-Christian God**." *Id.* at 1293, 1318 (emphasis added) (App. 87a, 132a).

On July 1, 2003, the United States Court of Appeals for the Eleventh Circuit affirmed Judge Thompson's decision, emphasizing "that [Chief Justice Moore's] purpose in placing the monument in the Judicial Building was **to acknowledge the law and sovereignty of the God of the Holy Scriptures**." *Glassroth v. Moore*, 335 F.3d 1282, 1296 (11th Cir. 2003) (App. 72a) (emphasis added). "[W]e reach **the same conclusion the district court did**, which is to say that we also agree with the concession that Chief Justice Moore made in his testimony when he said that **the monument 'reflects the sovereignty of God over men**.'" *Id.* at 1297 (quoting trial transcript) (emphasis added) (App. 74a).

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[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

On August 5, 2003, Judge Thompson ordered Chief Justice Moore "to remove, by no later than August 20, 2003, the Ten Commandments monument at issue in this litigation from the non-private areas of the Alabama State Judicial Building." *Glassroth v. Moore*, 275 F. Supp. 2d 1347, 1348-49 (M.D. Ala. 2003) (App. 46a).[3] After the August 20, 2004 deadline passed, the *Glassroth* plaintiffs filed a motion seeking contempt charges against Chief Justice Moore, but the matter became moot when the eight Associate Justices of the Alabama Supreme Court compelled the building manager to remove the monument to a nonpublic area of the judicial building. *Moore v. Judicial Inquiry Commission*, No. 1030398, slip op. at 9 (Ala., Apr. 30, 2004) (App. 7a).

B. The State Judicial Ethics Proceedings

Prior to the removal of the monument, on August 14, 2003, Chief Justice Moore publicly announced that he could not remove the monument because the court order commanding him to do so was unlawful, requiring him to act contrary to his oath to the United States Constitution and to the Alabama Constitution. The same day, one of the plaintiff-attorneys, not content with seeing the Ten Commandments monument removed, filed an ethics charge against Chief Justice Moore with the Alabama Judicial Inquiry Commission ("JIC"), "an investigatory body analogous to a grand jury," *In re Samford*, 352 So. 2d 1126, 1129 (Ala. 1977), seeking the removal of Chief Justice Moore from office. *See* Ala. Const. of 1901, amend. 581 § 6.17 (App. 146a-147a).

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[3] On August 23, 2003, this Court denied Chief Justice Moore's motion to stay enforcement of the August 5, 2003 judgment. *In re Roy S. Moore*, 539 U.S. __ (2003) (Order denying application to recall mandate and to stay enforcement of final judgment). On November 3, 2003, this Court denied certiorari review of the Eleventh Circuit's opinion. *Moore v. Glassroth*, 124 S. Ct. 497 (2003).

On August 22, 2003, the JIC filed an ethics complaint against Chief Justice Moore in the Alabama Court of the Judiciary ("COJ"),[4] *Moore v. Judicial Inquiry Comm'n*, No. 1030398, slip op. at 10 (Ala. 2004) (App. 134a-142a, 7a), a constitutionally-created trial court that only convenes "to hear complaints filed by the Judicial Inquiry Commission." Ala. Const. of 1901, amend. 581 § 6.18(a) (App. 148a).[5] The JIC's complaint alleged six separate violations of Canons 1, 2A, and 2B of the Canons of Judicial Ethics based on the same act: Chief Justice Moore's "fail[ure] to comply with an existing and binding court order directed to him." (App. 40a-42a.) Specifically, the JIC alleged that: Chief Justice Moore "fail[ed] to uphold the integrity and independence of the judiciary" (Canon 1); "fail[ed] to avoid impropriety" and the appearance thereof (Canon 2); failed to "respect and comply with the law" and to "promote[] public confidence in the integrity and impartiality of the judiciary" (Canon 2A); and "fail[ed] to avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute" (Canon 2B). (App. 40a-42a, 149a-150a.)

On November 12, 2003, the Court of the Judiciary tried Chief Justice Moore on the ethics charges arising from his "fail[ure] to comply" with the *Glassroth* injunction. In his preliminary remarks, Chief Judge William C. Thompson confirmed in open court that Chief Justice Moore's arguments that the *Glassroth* injunction was unlawful and unethical—and, therefore, not binding—would be disregarded: "This court has

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[4] Because of the filing of the JIC complaint, and pursuant to the Alabama Constitution, Chief Justice Moore was immediately disqualified from acting as a judge. Ala. Const. 1901, amend. 328, § 6.19 (App. 146a).

[5] The COJ has the authority, in pertinent part, "after notice and public hearing . . . to remove from office, suspend without pay, or censure a judge, or apply such other sanction as may [be] prescribed by law, for violation of a Canon of Judicial Ethics, misconduct in office, [or] failure to perform his or her duties." Ala. Const. of 1901, amend. 581 § 6.18(a) (App. 148a).

neither the authority nor the jurisdiction to entertain issues regarding the correctness of the decision of the United States District Court regarding the placement of the 10 Commandments monument in the rotunda of [the Alabama Judicial Building]." Reporter's Transcript in Alabama Court of the Judiciary, Case No. 33, at 30-31 (2003) (hereinafter "Transcript"). Thus, from the outset of the COJ ethics trial, Chief Justice Moore was prohibited from offering in his defense any claim that the court order he had disobeyed was unlawful and unethical.

Furthermore, although Chief Justice Moore testified before the COJ that the Ten Commandments monument was an "acknowledgement of God" as the "moral foundation of our law" (Transcript at 90), and that to remove the monument would cause him to violate his conscience and his oath of office, *id.* at 96, the prosecution—like the court—was not interested. In his cross-examination of the Chief Justice, then-Attorney General Bill Pryor, representing the JIC, emphasized that the prosecution—which was permitted to use the *Glassroth* order against Chief Justice Moore—cared only about **whether** he would continue to acknowledge God, not why.

> Q. And your understanding is that the federal court ordered that you could not acknowledge God; isn't that right?
>
> A. Yes.
>
> Q. And if your resume your duties as Chief Justice after this proceeding, you will continue to acknowledge God as you have testified that you would today, no matter what any other official says?
>
> A. Absolutely. Without—if I can clarify that. Without an acknowledgement of God, I cannot do my duty. I must acknowledge God. It says so in the Constitution of Alabama. It says so in the 1st Amendmen[t] to the United States Constitution. It says so in everything I've read. So—

> Q. Well, the only point I'm trying to clarify, Mr. Chief Justice, is not why, but only that in fact if you do resume your duties as Chief Justice, you would continue to do that without regard to what any other official says; isn't that right?
>
> A. Well, I would do the same thing this court did in starting with the prayer. That's an acknowledgment of God. I would do the same that Justices do when they place their hand on the [B]ible and say So Help Me God. It's the acknowledgement of God.
>
> The Alabama Supreme Court opens with God save this state and this Honorable Court. It's an acknowledgement of God, in my opinion, which I have written many opinions, acknowledging God as the moral source of our law. I think you must.

Transcript at 117-18. In closing arguments, the JIC argued that Chief Justice Moore must be removed because he did not follow "a final injunction entered against him" and was "totally unrepentant" for not doing so. *Moore*, slip op. at 24 (App. 17a). Chief Justice Moore argued that he acknowledged God in accordance with his oath, and that he could not ethically follow the unlawful federal court order to remove that acknowledgment because it would have caused him to violate his oath of office. Transcript at 138-39.

C. The Court Of The Judiciary Opinion

The following morning, the COJ issued a twelve-page opinion holding that Chief Justice Moore had violated the Canons of Judicial Ethics because of his failure to follow the District Court's order to remove the monument from the rotunda of the Alabama Judicial Building. *See In Re Roy S. Moore, Chief Justice of The Supreme Court of Alabama*, No. 33 (Ala. Ct. Jud., Nov. 13, 2003) (App. 26a-33a). True to its word, the court refused to consider the unethical nature of the

Glassroth injunction, *id.* at 1 (App. 26a), but nevertheless held that Chief Justice Moore was "bound by, and had the duty to follow, [it]." *Id.* at 359 (App. 32a). Because the COJ felt that Chief Justice Moore had failed to give it adequate assurance that he would "follow [the *Glassroth*] order or any similar order in the future," it ordered that Chief Justice Moore be removed from office. *Id.* at 560-61 (App. 32-33a).

D. The Appeal To The Alabama Supreme Court

On appeal to a specially-appointed Alabama Supreme Court,[6] Chief Justice Moore argued, among other things, that the COJ erred because (1) it demanded that Chief Justice Moore remove an acknowledgment of God in order to maintain his public office, thus imposing a religious test upon Chief Justice Moore contrary to the First Amendment and this Court's decisions in *Torcaso v. Watkins*, *infra*, and *McDaniel v. Paty*, *infra*; and (2) it violated Chief Justice Moore's right to due process of law under the Fourteenth Amendment by failing to consider Chief Justice Moore's defense that his actions were not unethical because the federal injunction was ethically nonbinding. *See Moore*, slip op. at 22-23, 27 (App. 16a, 19a). The Alabama Supreme Court, like the COJ below, refused to consider whether the *Glassroth* injunction was unethical and unlawful, swallowed wholesale the arguments by the JIC, rejected Chief Justice Moore's arguments, and rubberstamped

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[6] Ala. Const. of 1901, amend. 581, § 6.18(b), provides that "[a] judge aggrieved by a decision of the Court of the Judiciary may appeal to the supreme court." (App. 148a.) The day after Chief Justice Moore filed his appeal, the justices of the Alabama Supreme Court issued a unanimous order recusing themselves from the case and authorizing the acting chief justice to participate with the Governor in a random drawing of names from a pool of retired justices and judges of the Alabama State Bar to assemble a special supreme court for this case. The special supreme court was subsequently appointed in the manner described in the order. *See Moore* slip. op. at 1-2 n.1 (App. 1-2a).

the COJ's decision to remove him from office. *See id.* at 19-21, 23-26, 28 (App. 14a-15a, 16a-19a, 33a).

REASONS FOR GRANTING THE WRIT

The nature of the proceeding before the Alabama Court of the Judiciary was fundamentally different from any that were, or could have been, held before the federal district court in *Glassroth v. Moore*. It was **not** a proceeding to determine whether Chief Justice Moore violated federal law—as in a contempt hearing—but rather whether he breached Alabama Canons of Judicial Ethics, which "govern the character and conduct of judges in the State of Alabama." *Butler v. Alabama Judicial Inquiry Comm'n*, 802 So. 2d 207, 210 (Ala. 2001).

Yet, an ethical analysis of Chief Justice Moore's behavior is conspicuously absent from the opinions of the Alabama courts.[7] In its place is a bare recital of the undisputed fact that Chief Justice Moore did not comply with the federal court order and a proclamation of limited jurisdiction for review that cut off any consideration of Chief Justice Moore's ethical defense of his actions.

Not content with refusing to consider Chief Justice Moore's pertinent defense to the ethical charges, the Alabama courts compounded their constitutional error by imposing a novel religious test upon Chief Justice Moore by removing him from office for his refusal to cease acknowledging God. The Alabama courts in essence forced Chief Justice Moore to choose between publicly professing his belief in God or keeping his public office.

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[7] Indeed, neither the opinion of the Court of the Judiciary nor that of the Alabama Supreme Court discusses specifically how Chief Justice Moore violated the language of any of the Canons under which he was charged. Instead, the Alabama courts simply assumed that failure to follow a federal court order automatically resulted in violations of the Canons.

Thus, this case involves the unprecedented removal from office of a Chief Justice because of the profession of his religious beliefs without any consideration of the ethical defense for his actions. It presents, therefore, two important federal questions under the Constitution that warrant a hearing by this Court: (1) whether the Chief Justice was subjected to an unconstitutional religious test, and (2) whether he was unconstitutionally denied any meaningful defense.

I. THE DECISION TO REMOVE CHIEF JUSTICE MOORE FROM PUBLIC OFFICE CONFLICTS WITH *TORCASO V. WATKINS* AND *MCDANIEL V. PATY.*

By removing Chief Justice Moore from office because he refused to forsake the public acknowledgment of God through the Ten Commandments monument, as required by a federal court order—and further because he testified that, as Chief Justice, he would continue in the future to acknowledge God despite any court order requiring him not to do so—the Court of the Judiciary, as affirmed by the Alabama Supreme Court, imposed an unconstitutional religious test, disqualifying Chief Justice Moore from holding the office of Chief Justice of the Alabama Supreme Court. This Court should seize this opportunity to rule that it is just as much a constitutional violation to remove an official from public office because he, as a matter of conscience, must freely acknowledge God in the performance of his official duties, as it is to exclude a person from holding office because, as a matter of conscience, that person cannot freely affirm a personal belief in God, as this Court held in *Torcaso v. Watkins*, 367 U.S. 488 (1961).[8]

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[8] Traditionally, the acknowledgment of God was not considered a religious test. *See, e.g.*, oath provision of Judiciary Act of 1789, currently codified at 28 U.S.C. § 453, which required federal judicial officers to conclude the oath of office with the phrase, "So help me God." Nevertheless, Chief Justice Moore recognizes that this Court held in *Torcaso v. Watkins*, 367 U.S. 488 (1961), that the qualification of a

A. The Courts Below Removed Chief Justice Moore From Office Because He Refused To Forsake His Acknowledgment Of God In The Performance Of His Official Duties.

The ethics charges brought against Chief Justice Moore, which led to his conviction and removal from office, rested ostensibly upon the failure of the Chief Justice to comply with a federal court order. The order, however, was expressly predicated upon the holding that Chief Justice Moore had violated the Establishment Clause of the First Amendment **not** because he displayed the Ten Commandments in a government building (*Glassroth*, 229 F. Supp. 2d at 1293 (App. 87a)), but because he placed the Ten Commandments monument "in the Alabama State Judicial Building **with the specific purpose and effect . . . of acknowledging the Judeo-Christian God as the moral foundation of our laws**" and "**of establishing a permanent recognition of the 'sovereignty of God,' the Judeo-Christian God**." *Id.* at 1293, 1318 (App. 87a, 132a) (emphasis added). The Court of Appeals for the Eleventh Circuit affirmed that opinion, holding "that the monument '**reflects the sovereignty of God over men**'" and referencing Chief Justice Moore's trial testimony "that his purpose in placing the monument in the Judicial Building was **to acknowledge the law and sovereignty of the God of the Holy Scriptures**." *Glassroth v. Moore*, 335 F.3d 1282, 1296, 1297 (11th Cir. 2003) (App. 72a, 74a) (emphasis added). Upon receiving the mandate from the Eleventh Circuit, the district court issued its order and injunction against Chief Justice Moore, ultimately leading to the proceedings in this case. Therefore, the federal courts—at both the trial and

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profession of a belief in God is an unconstitutional religious test. By the reasoning of the Alabama courts below, however, such an acknowledgment of God as part of a state judicial officer's oath may be forbidden, even if the officer freely chooses to profess such a belief.

appellate levels—expressly held that the Ten Commandments monument was unconstitutional **because** Chief Justice Moore "acknowledg[ed] . . . God." *Id.* at 1296 (App. 72a); *Glassroth*, 229 F. Supp. 2d at 1293 (App. 87a).

As in the federal case, the unrebutted evidence in the ethics trial before the state Court of the Judiciary plainly showed that the Ten Commandments monument was an "acknowledgement of God" as the "moral foundation of our law." Transcript at 90. It was for this very reason that the federal courts considered it constitutionally forbidden, but it was also for this very reason that Chief Justice Moore could not, because of his religious convictions and his sacred oath of office, remove the monument: "[To move the monument] would violate my conscience, violate my oath of office, violate the 10th Amendment of the United States Constitution, as well as violate the 1st Amendment." Transcript at 96.

Although the JIC's ethics prosecution rested initially upon the federal court decree that Chief Justice Moore "could not acknowledge God" by means of the Ten Commandments monument, it did not remain there. On cross-examination of the Chief Justice, the JIC prosecutor demanded to know—not once, but twice—whether, if he was restored to his judicial position, Chief Justice Moore would "**continue to acknowledge God** as you have testified that you would today, no matter what any other official says?" Transcript at 117 (emphasis added).) Chief Justice Moore's answers to this inquisition were an unequivocal "[a]bsolutely" and "I think you must." Transcript at 117-18. In closing arguments, the JIC argued that Chief Justice Moore ought to be removed, not only because he did not follow a federal court order that would have required the Chief Justice to forsake his acknowledgment of God through the Ten Commandments monument, but because the Chief Justice was "totally unrepentant" (*see Moore*, slip op. at 24 (App. 17a)), having affirmed that he

would "continue to acknowledge God . . . no matter what any other official says." Transcript at 117.

Despite the record of both the federal courts and of the Court of the Judiciary that Chief Justice Moore's actions were unconstitutional **because** he acknowledged God, the Alabama Supreme Court stated that "this case is not about a public official's right to acknowledge God." *Moore*, slip. op. at 25 (App. 18a). Rather, the Supreme Court opined that the removal of the Chief Justice was based solely upon the undisputed fact that Chief Justice Moore "refused to obey a valid order of a United States District Court." *Id.* (App. 18a). This finding is completely unsupportable, and constitutes a disingenuous effort to sidestep Chief Justice Moore's religious test argument. Even so, by premising its decision on the federal court order, the court necessarily adopted the federal courts' decision that the reason for the removal of the Ten Commandments monument was because Chief Justice Moore, through the monument, had unconstitutionally "acknowledg[ed] . . . God." *See Glassroth*, 335 F.3d at 1296, 1297 (App. 72a, 74a); *Glassroth*, 229 F. Supp. 2d at 1293, 1318 (App. 87a, 132a). By its reliance upon the federal court order that the monument be removed, the Supreme Court admitted that the reason for the removal of the Chief Justice was his acknowledgement of God. Moreover, the only reason the COJ gave for imposing the ultimate sanction upon Chief Justice Moore—removal from office—was that he gave the court "no assurances that he would follow that order **or any similar order in the future**" prohibiting an acknowledgment of God. *In re Moore*, at 560 (App. 33a.) Thus, the fact that Chief Justice Moore was required to remove a public acknowledgment of God, and that he would dare to continue acknowledgments of God in public office, is not only undeniable, it was the very basis for his ethics prosecution and removal. Having avoided that issue on appeal, the Alabama Supreme Court simply rubberstamped the COJ's error.

B. The Decision To Remove Chief Justice Moore For Refusing To Forsake His Acknowledgment Of God Answered An Important Federal Question In Conflict With *Torcaso v. Watkins* And *McDaniel v. Paty.*

By forcing Chief Justice Moore to decide between an acknowledgment of God and remaining in public office, the state courts applied a unique religious test, requiring the Chief Justice to abandon his religious conviction that God is the moral foundation of law as a qualification for his continuing to hold the office of chief justice. Forty-three years ago, this Court ruled that no person could be refused a commission to serve as a notary public on condition that he submit a "declaration of belief in the existence of God." *Torcaso*, 367 U.S. at 489. A God-fearing, sitting chief justice in Alabama should enjoy the same constitutional protection as an unbelieving aspirant to the office of a notary public in Maryland—because the rule in *Torcaso* affirms that "neither a State nor the Federal Government can constitutionally force a person to '**profess a belief or disbelief** in any religion.'" *Id.* at 495 (emphasis added).

"'The [religious] test oath is abhorrent to our tradition.'" *Id.* at 491 (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)). George Washington hailed this tradition when he wrote, "[I]n this Land of equal liberty it is our boast, that a man's religious tenets will not forfeit the protection of the Laws, nor deprive him of the right of **attaining and holding** the highest Offices that are known in the United States." *American State Papers and Related Documents on Freedom in Religion* 173 (The Religious Liberty Assoc., 4th rev. ed. 1949) (emphasis added). Likewise, Thomas Jefferson strongly opposed religious tests in his seminal Virginia "Bill for Establishing Religious Freedom":

> [P]roscribing any citizen as unworthy the publick [sic] confidence, by laying upon him an incapacity of being called

> to offices of trust and emolument, unless he **profess or renounce** this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens he has a natural right.

Thomas Jefferson, "A Bill for Establishing Religious Freedom" (June 12, 1779), in 5 *The Founders' Constitution* 77 (P. Kurland & R. Lerner eds. 1987) (emphasis added). Not only were religious tests injurious of natural rights, they were practically ineffective in their attempt to exclude from public office those who held a disfavored religious belief. As Oliver Ellsworth, a member of the Federal Constitutional Convention and later Chief Justice of this Court, once wrote:

> In short, test-laws are utterly ineffectual; they are no security at all; because men of loose principles will, by an external compliance, evade them. If they exclude any persons, it will be honest men, men of principle, who will rather suffer an injury, than act contrary to the dictates of their consciences.

Oliver Ellsworth, *Landholder*, No. 7, Essays 168-71 (Dec. 17, 1787), in 4 *The Founders' Constitution* 640, *supra*; *Torcaso*, 367 U.S. at 494 n.9. Justice Hugo Black aptly noted that "[t]est oaths, designed to impose civil disabilities upon men for their beliefs rather than for unlawful conduct, were an abomination to the founders of this nation." *In re Summers*, 325 U.S. 561, 576 (1945) (Black, J., dissenting). Accordingly, the United States Constitution incorporated the provision that "no religious Tests shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const. art. VI (App. 144a). *See Torcaso*, 367 U.S. at 491 ("the desire to put the people 'securely beyond the reach' of religious test oaths brought about the inclusion [of the religious test provision] in Article VI").

In *Torcaso*, this Court held that the First Amendment's protections of religious freedom rendered unconstitutional a religious test in the Maryland Constitution that "was designed

to . . . bar every person who refuses to declare a belief in God from holding a public 'office of profit or trust' in Maryland." 367 U.S. at 489-90. Torcaso had been appointed as a notary public but was refused a commission to serve "because he would not declare his belief in God," as required by the Maryland Constitution. *Id.* at 489. Moreover, the *Torcaso* Court also made it clear that its Establishment Clause cases, to date, could not be used "to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept." *Id.* at 494.

In *Torcaso*, the Maryland Supreme Court defended that state's religious test by arguing that such a qualification did not affect the right to freedom of **belief**: "'[Torcaso] is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office.'" *Id.* at 495 (citation omitted). This Court soundly rejected that distinction, holding that the fact that a person "is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Id.* at 495-96. The Maryland religious test for public office "unconstitutionally invade[d] [Torcaso's] freedom of belief and religion" and was therefore unenforceable because it excluded from office those who held the "wrong" belief. *Id.* at 496. *Torcaso* thus stands for the proposition that freedom of religion prohibits the government from affirmatively punishing or excluding from public office those "persons who have, **or perhaps more properly profess to have**" a particular religious belief. *Id.* at 494 (emphasis added).

Chief Justice Moore believes in the sovereignty of Almighty God, and accordingly professed that belief, as the federal courts agreed, when he acknowledged God in public office

with the installation of the Ten Commandments monument. *See, e.g.*, Transcript at 90; *Moore*, slip op. at 16-17 (quoting federal court order's reference to the monument as an acknowledgment of God) (App. 12a); *Glassroth*, 335 F.3d at 1284, 1296, 1297 (App. 49a, 72a, 74a); *Glassroth*, 229 F. Supp. 2d at 1293, 1299, 1310 (87a, 98a, 117a-118a). He was removed precisely because he would not forsake that acknowledgment of God even in the face of a federal injunction, and, to compound that error further, the COJ found the Chief Justice "unrepentant," because of his testimony that that he would continue to acknowledge God as Chief Justice. *See generally In re Moore*, at 560 (App. 32a-33a.)

In an attempt to justify its discrimination against the Chief Justice for his religious convictions, the Alabama Supreme Court insinuated that Chief Justice Moore was not subjected to a religious test because his absolute "freedom to believe"—as opposed to his "freedom to act"—was not restricted by the COJ. *See Moore*, slip op. at 23-24 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)) (App. 17a). Such a distinction, as *Torcaso* makes plain, is untenable.[9]

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[9] By its nature, the religious belief of any person is beyond the reach of civil authority because religion "'or the duty which we owe to our Creator and the manner of discharging it, **can be directed only by reason and conviction**, not by force or violence.'" James Madison, *Memorial and Remonstrance* (1975) (quoting Va. Const. art. I § 16) (emphasis added). *See also Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878). Religious belief is outside the civil authority not just because it is an "unalienable right," as Madison characterized it, *see* Remonstrance; but it is metaphysically "directed only by reason and conviction" because belief resides in the recesses of the heart and mind, which no man (civil officer or not) has the power (or authority) to discern. "[F]or the LORD seeth not as man seeth; for man looketh on the outward appearance, but the LORD looketh on the heart." I *Samuel* 16:7b. That which cannot be assessed cannot be judged. For a state body such as the Judicial Inquiry Commission or the Alabama Supreme Court to claim that its action does not affect the

Torcaso was not punished or deprived of his office because of his heart's belief, but because he refused to make a particular **profession** of belief. As this Court put it, Maryland did not just limit public offices to persons who simply "have" a particular religious belief, but to those who "**perhaps more properly *profess* to have**[] a belief in some particular kind of religious concept." 367 U.S. at 494 (emphasis added). The civil incapacitation was inflicted upon Torcaso because of the manifestation of—the lack of profession of—his belief (or unbelief). Presumably, Torcaso could have made a profession of a belief in God, through what Ellsworth termed "an external compliance," *Id.* at 494 n.9, and thereby gained his appointed office of notary public; but such a profession would not have been, to Torcaso's conscience, an honest profession. But regardless, Maryland could not judge his honesty or his personal, religious belief, but only his act of professing the required belief in God. "Under our Constitution, men are punished for what they do or fail to do and not for what they think and believe." *Summers*, 325 U.S. at 578 (Black, J., dissenting). It was, then, Torcaso's failure to *profess* a belief in God that led to his preclusion from public office, not his failure to believe.

Although the test applied to Chief Justice Moore by the Alabama courts did not require him to **profess** a belief in God, it did require him to **refrain** from acknowledging God through the federally-disapproved monument[10] or any other means. According to the Supreme Court, Chief Justice Moore's freedom to believe in God and profess the same would not be

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freedom to believe is disingenuous because the state only has the power to punish **actions** not simply naked **belief**.

[10] Ironically, Judge Myron Thompson held that Chief Justice Moore's belief "that the Judeo Christian God is sovereign over the state" was "just [the] type of belief that the Free Exercise clause and the Establishment Clause are meant to protect." 229 F. Supp. 2d at 1310 (App. 117a).

infringed—so long as he did not do it while occupying the office of Alabama Chief Justice.[11] Such a civil disability, however, "invades [Chief Justice Moore's] freedom of belief and religion" in that it renders unattainable "[Alabama] public offices to persons who have, or perhaps more properly profess to have, a belief in [God]." *See* 367 U.S. at 494. No civil officer should be required to renounce and retract a profession of the sovereignty of God simply to keep his job. "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality). Because the Alabama courts laid a test upon Chief Justice Moore that prohibited his profession of God as the moral foundation of law while in office, and then removed him for "failing" that test, the courts below violated the *Torcaso* rule.

While *Torcaso* makes it clear that beliefs, and profession thereof, by current or putative public officials are beyond the reach of civil disability, *McDaniel v. Paty* demonstrates that the Establishment Clause may not be invoked to justify a state from excluding religious views from the affairs of civil government. 435 U.S. at 628-29. Yet, that is precisely what the COJ and the Alabama Supreme Court did in this case, relying as they did upon the Establishment Clause decisions of the federal courts to justify not only the removal of the Ten Commandments monument, but the removal of the Chief Justice from office. In so doing, the courts below ignored Justice Brennan's clarion call limiting the Establishment Clause so as not to interfere with the overriding guarantee of the Free Exercise Clause:

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[11] Prior to his election, Chief Justice Moore could not have had notice of this qualification because the Alabama Constitution (which affirmatively acknowledges and invokes the favor and guidance of "Almighty God" in the establishment of the Alabama Justice system) actually forbids any religious tests for public office. *See* Ala. Const. of 1901, pmbl. (App. 145a); Ala. Const. of 1901, art. I §3.

> The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities. Government may not inquire into the religious beliefs and motivations of officeholders—**it may not remove them from office merely for making public statements about religion [or God], or question whether their [] actions stem from religious conviction.**
>
> In short, government may not as a goal promote "safe thinking" with respect to religion and fence out from political participation those . . . whom it regards as overinvolved in religion. Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. **The Establishment Clause . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.**

McDaniel, 435 U.S. at 641-42 (Brennan, J. concurring) (citations omitted) (emphasis added).

II. THE DECISIONS BELOW DENYING CHIEF JUSTICE MOORE ANY OPPORTUNITY TO MAKE AN ETHICAL DEFENSE OF HIS ACTION ANSWERED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH THIS COURT'S DUE PROCESS PRINCIPLES.

Despite the fact that Chief Justice Moore was tried and convicted of violating the Alabama Canons of Judicial **Ethics**, the Alabama courts adamantly refused to consider Chief Justice Moore's arguments defending the **ethics** of his actions. Instead, the Alabama courts ruled that Chief Justice Moore's failure to comply with the federal court order was the **only** relevant issue whether the Chief Justice had violated the canons of judicial ethics. In essence, the COJ, with the

approval of the Alabama Supreme Court, conducted a proxy contempt hearing on behalf of the federal district court, but then ordered a punishment that no federal court could—removal from public office. By conflating the federal case to remove the Ten Commandments monument pursuant to a complaint alleging a violation of the Establishment Clause, with the State proceedings to remove a chief justice pursuant to a complaint alleging violations of judicial ethics, the state courts denied the highest judicial officer in the State of his property rights without due process of law as guaranteed by the Fourteenth Amendment and as applied by this Court.

A. Chief Justice Moore Was Denied A Property Interest Protected By The Due Process Principles Of This Court.

Chief Justice Moore has a property interest in his former judicial position that merits protection under the Due Process Clause of the Fourteenth Amendment. "Protected interests in property are normally . . . 'created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss v. Lopez*, 419 U.S. 565, 572-73 (1975) (*quoting Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). It follows that "a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process." *Id.* at 573. Chief Justice Moore was elected by the people of Alabama in 2000 to serve a full six-year term as Chief Justice of the State, and, under the Alabama Constitution, judges who legally hold office may only be removed through proceedings before the Alabama Court of the Judiciary. *See* Ala. Const. of 1901, amend. 581, § 6.18(a) (App. 148a); *Ex parte Hann*, 592 So. 2d 577 (Ala. 1992). Thus, Chief Justice Moore had "a legitimate claim of entitlement to continued employment" as Chief Justice at the time of his trial.

B. Chief Justice Moore's Property Interest Was Denied Without Any Meaningful Opportunity To Be Heard On The Essential Element Of The Offense Of Which He Was Charged.

"Due process" under the Fourteenth Amendment requires "that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (*quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). Amendment 581, § 6.18(a) of the Alabama Constitution of 1901 mirrors this requirement, stating that the Court of the Judiciary may impose penalties upon a judge "for violation of a Canon of Judicial Ethics" only "after notice and a public hearing." (App. 148a.) Chief Justice Moore was given notice of the charges against him and a hearing on those charges was held before the Court of the Judiciary. However, the COJ denied Chief Justice Moore of any "meaningful" hearing by refusing even to consider the core arguments he presented in defense of the charges. *See* Clerk's Record ("Record") at 26, 30-31; *In re Moore*, at 549 (App. 26a); *Moore*, slip op. at 19-21, 28-29 (App. 14a-15a, 20a-21a). A hearing in name only does not meet the due process standards required by this Court. *See, e.g., Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("'Due process requires that there be an opportunity to present every available defense.'" (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); *Bell v. Burson*, 402 U.S. 535, 541-42 (1971) (a "hearing required by the Due Process Clause must be 'meaningful,' *Armstrong v. Manzo*, [380 U.S. 545, 552] (1965), and 'appropriate to the nature of the case.' *Mullane v. Central Hanover Bank & Trust Co.*, [339 U.S. 306, 313 (1950).] It is a proposition which hardly seems to need explication that a hearing **which excludes consideration of an element essential to the decision** . . . does not meet this standard." (emphasis added)).

The linchpin of the case against Chief Justice Moore was that "he willfully failed to comply with an existing and **binding** court order directed to him," in violation of Canons 1 and 2 of the Canons of Judicial Ethics. Record at 11-13 (emphasis added) (App. 40a-42a). In defense of his actions, Chief Justice Moore argued that, while he did refuse to comply with the federal court order, the order was **not ethically** binding on him, and because it was not ethically binding, he had not breached the Canons of Ethics. Thus, at the heart of Chief Justice Moore's ethical defense was his argument that the federal court order was itself unlawful. Chief Justice argued to the Alabama courts that the federal court order was unlawful because the order: (1) was based on an opinion that utterly failed to apply the textual provisions of the Establishment Clause of the First Amendment; (2) involved a federal officer commanding a State officer in a subject-matter wholly within the jurisdiction of the states, thus contravening the Tenth Amendment; and (3) required Chief Justice Moore to violate his oath to support the United States and Alabama Constitutions. The Alabama courts, however, refused to consider these arguments and thereby "excluded an element essential to the decision," *Bell*, 402 U.S. at 541-42, *i.e.*, whether the order was, in fact, ethically binding on Chief Justice Moore. Therefore, those courts denied Chief Justice Moore's right to due process of law.

1. The Different Nature of the State Ethics Proceedings

The Court of the Judiciary and the Alabama Supreme Court justified their refusal to consider these arguments by claiming that such consideration would require the COJ to engage in a "collateral review of the merits of the federal court order," reasoning that "the Court of the Judiciary does not have the authority to correct or control the judgments of federal courts, and the general rule is that state and federal courts will not interfere with 'or try to restrain each other's proceedings.'" *Moore*, slip op. at 19, 20 (quoting *Donovan v. City of Dallas*,

377 U.S. 408, 412 (1964)) (App. 14a, 15a). By thus concluding, the Alabama courts failed to recognize the fundamental differences between the state and federal proceedings concerning Chief Justice Moore.

Chief Justice Moore never requested—nor in order to prevail did he need to request—that the Court of the Judiciary "correct or control" the judgment in *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002). He contended that, for the purpose of determining his culpability on the charges of violating the Canons of Judicial Ethics, the COJ could and, in fact, **must** review whether the federal court order was lawful and therefore binding on the Chief Justice in his official capacity. By definition, collateral attacks are cases that seek "to deprive [judgments] of their normal force and effect in a proceeding that had an independent purpose other than to overturn the prior judgments." *Parke v. Raley*, 506 U.S. 20, 30 (1992) (citing *Black's Law Dictionary* 261 (6th ed. 1990)). Chief Justice Moore did not seek through his defense to inhibit the enforcement of the federal court order, nor would the COJ's review of the binding effect of that order have affected the enforcement of that order. Indeed, the order was enforced and the Ten Commandments monument was removed from the rotunda of the Alabama Judicial Building before any action was taken against Chief Justice Moore with regard to alleged violations of the Canons of Judicial Ethics.

Simply put, the trial before the COJ was an ethics proceeding, not a forum for determining whether Chief Justice Moore violated federal law. The latter determination would have been made by the federal district court in a contempt hearing, with the purpose of either punishing Chief Justice Moore for failing to comply with the court order or to compel compliance with the order. *See, e.g., Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 827, 828 (1994) (explaining that criminal contempt's purpose is "'punitive, to vindicate the authority of the court,'" while civil contempt is

"designed to compel future compliance with a court order." (citation omitted)).

In contrast, an ethics proceeding axiomatically requires a court to consider whether the defendant behaved in an ethical fashion in the charged matter. Thus, defenses that addressed the ethics of Chief Justice Moore's decision not to obey the federal court order should have been available to him (*see Lindsey*, 405 U.S. at 66), but the Alabama courts refused to consider any of those defenses.[12] Because of this refusal, Chief Justice Moore essentially had **no chance** of defending himself before the Court of the Judiciary or the Alabama Supreme Court because those courts did not care **why** he elected not to follow the federal court order; they only cared that he did, in fact, fail to follow it. *See* Transcript at 117-18.

While both the COJ and the Alabama Supreme Court emphasized that the state proceedings were separate from the *Glassroth* case, *see In re Moore*, at 549 (App. 26a); *Moore*, slip. op. at 19-21 (App. 14a-15a), they understood this separate nature to mean that because "'[t]he Court of the Judiciary is a trial court whose jurisdiction is limited to the trial of complaints filed by [the Judicial Inquiry Commission,] charging a judge or justice with violating one or more of the [Canons of Judicial Ethics,]'" it had no authority to review any aspect or effect of the federal court order. *Moore*, slip op. at 20

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[12] A "legal" code is simply "a body of rules of action or conduct prescribed by [a] controlling authority [that has] binding legal force." *Black's Law Dictionary* 884 (6th ed. 1990). A code of "ethics" measures "conformity with **moral** norms or standards of professional conduct." *Black's Law Dictionary* 573 (7th ed. 1999) (emphasis added). Conforming behavior to an ethical standard denotes a quality of action **in addition to** a legal standard, *i.e.*, a moral component. Thus, in order for the Alabama courts to find Chief Justice Moore guilty of the ethics charges leveled against him, it was incumbent upon them not just to determine whether he failed to follow the federal court order, but rather whether this failure was ethically right or wrong.

(citation omitted) (App. 14a). As the Alabama Supreme Court concluded, "[o]nly a superior federal court can review the merits of a ruling by a federal court." *Id.* (App. 15a).

However, it was the Alabama courts, not Chief Justice Moore, that combined the **federal legal** claims and the **state ethical** claims into one proceeding. The Court of the Judiciary, quoting from the order of the Alabama Supreme Court that overruled Chief Justice Moore's decision to leave the Ten Commandments monument in the rotunda, stated that

> the justices of this Court are bound by solemn oath to follow the law, whether they agree or disagree with it, because "all the officers of the government, from the highest to the lowest are creatures of the law, and are bound to obey it." It is therefore the unanimous decision of this court that Chief Justice Moore has violated the Alabama Canons of Judicial Ethics as alleged by the JIC in its complaint.

In re Moore, at 559 (quoting *United States v. Lee*, 106 U.S. 196, 220 (1882)) (App. 32a). In other words, the COJ determined that Chief Justice Moore disobeyed the federal court order and then automatically concluded from this fact that he committed violations of the Alabama Canons of Judicial Ethics, without ever bothering to explore whether the second conclusion inevitably follows from the first.

Similarly, although the Alabama Supreme Court specifically held that "there was before the Court of the Judiciary clear and convincing evidence . . . that [the] injunction was a **binding order** of a court of competent jurisdiction," *Moore*, slip op. at 21 (App. 15a) (emphasis added), the Court failed to explain why a **legally** binding order necessarily is an **ethically** binding one. Rather, both courts simply assumed the **ethically** binding

nature of the federal court order and refused to consider any arguments to the contrary.[13]

The Alabama courts also cited the Supremacy Clause in support of their claims that they lacked jurisdiction to consider Chief Justice Moore's ethical defense. *See In re Moore*, 555-56 (App. 30a); *Moore*, slip op. at 15 (App. 11a). However, the Supremacy Clause was not implicated in the state ethics proceedings because the effect of the federal court order would have been the same, regardless of the outcome of the state trial. Whether the COJ found Chief Justice Moore in violation of the Canons of Judicial Ethics, and whether it removed him from office, would not have changed the effect of the federal court order. The federal and state cases were separate proceedings deciding separate questions.[14] Consideration of Chief Justice Moore's defenses merely would have compelled the Alabama courts to consider the **ethical** dimensions of his actions **as a matter of state law** before removing him from elected office.

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[13] Sir William Blackstone defined municipal law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." I W. Blackstone, *Commentaries on the Laws of England* 44 (Univ. of Chi. Facs. Ed. 1765). Apparently, to the Alabama courts, "law" is simply a rule of civil conduct from a superior to an inferior, regardless of whether it implicates right and wrong. Therefore, the Alabama courts—on charges of **ethical** misbehavior—removed Chief Justice Moore without acknowledging that there is any moral component to the law or to the Canons of Judicial Ethics; to them, law is simply a command that requires unquestioning obedience.

[14] This Court has observed that it is a "fundamental principle" that "our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *see, e.g.*, *Morrison*, 529 U.S. at 616 n.7; *Lopez*, 514 U.S. at 552-53. "[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

2. The Significance Of The Denial Of Due Process

The Alabama courts' refusal to consider the ethical dimension of the alleged ethical violations has startling implications. Suppose a federal court ordered Chief Justice Moore to summarily execute—without due process of law—certain persons currently residing in Alabama and Chief Justice Moore refused to comply with the order. Would such a refusal impugne "the integrity and independence of the judiciary?" Canon 1, Ala. Canons of Judicial Ethics (App. 149a). Would a refusal to obey such a federal court order represent "conduct prejudicial to the administration of justice?" Canon 2(B), Ala. Canons of Judicial Ethics (App. 150a).

Chief Justice Moore argued to the Alabama courts that the federal court based its injunction on an opinion that blatantly failed to apply the Establishment Clause of the First Amendment[15] (App. 144a), which was the governing law in the federal case,[16] and therefore the order had no binding effect upon him. This was so because a federal court order based on the Constitution possesses legitimacy only so long as it retains the support of the Constitution behind it. *See Marbury v. Madison*, 5 U.S. 179-80 (1803) ("[I]t is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature"). Moreover, Chief Justice Moore swore an oath to "support the Constitution of the United States, and the Constitution of the State of Alabama" and to "faithfully and honestly discharge the duties of the office . . . to the best of my

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[15] *See, e.g., Glassroth*, 229 F. Supp. 2d at 1313 (App. 123a) (refusing to define the term "religion" in the First Amendment).

[16] *See e.g.*, Va. Const. of 1776, art. I, § 16; James Madison, 1785 *Memorial and Remonstrance*; *Reynolds v. United States*, 98 U.S. 145, 163-66 (1878); and *Davis v. Beason*, 133 U.S. 333, 342 (1890) (providing the accepted definition of the term "religion" at the time of the adoption of the First Amendment).

ability. **So help me God**." Ala. Const. of 1901, art. XVI, § 279 (emphasis added) (145a); *see also*, U.S. Const. art. VI, cl. 2 (144a). This solemn oath required him not only to strictly adhere to the text of the First Amendment in the execution of his duties, but also, as chief administrator of the Alabama judicial system, *see* Ala. Code 1975 § 12-2-30(a) & (b)(7) (App. 149a), to administer justice by "**invoking the favor and guidance of Almighty God**." Ala. Const. of 1901, pmbl. (emphasis added) (App. 145a). Surely in adhering to the text of the First Amendment and in upholding his oath of office Chief Justice Moore was "conduct[ing] himself . . . in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2(A), Ala. Canons of Judicial Ethics (App. 150a). To proclaim that Chief Justice Moore's conduct was unethical and to remove him from office merely because Chief Justice Moore refused to follow a federal court order, without any consideration of the justification for his action, would undermine the hard-earned "Nuremberg defense" principle that a government official has a duty to refuse to obey an unlawful order by a superior official.[17]

If this Court declines to hear this case, then it will have countenanced the removal from office of the highest judicial officer in a State without his being afforded the basic right of an opportunity to be heard in defense of his actions. Such an outcome thwarts the wishes of the vast majority of Alabamians

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[17] The historic Nuremberg trials have so impacted our justice system that the "Nuremberg defense" has become a shorthand reference for a defense raised against charges of refusing to follow an illegal order. *See, e.g.*, Black's Law Dictionary 1098 (7th ed. 1999) (explaining that the "Nuremberg defense" is "[t]he defense asserted by a member of the military who has been charged with a crime of failing to obey an order and who claims that the order was illegal . . ." and that sometimes the defense "is used more broadly to describe situations in which citizens accused of committing domestic crimes . . . claim their crime was justified or mandated by international law").

who elected Chief Justice Moore to his office and makes a mockery of the very justice system that Chief Justice Moore was excoriated for allegedly disrespecting. More than that, however, if this decision of the Alabama Supreme Court is permitted to stand, then in any proceeding in which a public official is charged with ethical violations, the only relevant question will become **what** the official did—and never **why** the official acted as he did. The very nature of ethical obligations—the rightness or wrongness of one's actions—will be tossed upon the ash heap of irrelevancy.

"'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence . . . .'" *Faretta v. California*, 422 U.S. 806, 838 (1975) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)). It is the height of irony that such a basic right of justice was denied to the highest judicial officer in the State of Alabama. By granting this petition, the Court can remedy this travesty of justice, restore the integrity and legitimacy of ethics proceedings, and emphasize the distinct roles of the federal and state judicial systems.

CONCLUSION

For the reasons stated, Chief Justice Roy Moore's petition for a writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN D. DUPRÉ
GREGORY M. JONES
FOUNDATION FOR MORAL LAW, INC.
P.O. Box 231264
Montgomery, AL 36123
(334) 262-1245

HERBERT W. TITUS*
TROY A. TITUS, P.C.
477 Viking Drive, Ste. 150
Virginia Beach, VA 23452
(757) 486-8700

PHILLIP L. JAUREGUI
PHILLIP L. JAUREGUI, LLC
P.O. Box 43934
Birmingham, AL 35243
(205) 970-6050

**Counsel of Record*
Attorneys for Petitioner

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